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June 17, 2004  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

**Appeal**

Name of Case: Worker Appeal

Date of Filing: April 8, 2004

Case No.: TIA-0080

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant has been a DOE contractor employee at DOE facilities for many years. The OWA referred the application to an independent physician panel, which determined that the Applicant's illnesses were not related to his work at DOE. The OWA accepted the panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the panel's determination.

***I. Background***

***A. The Energy Employees Occupational Illness Compensation Program Act***

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) covers workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

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1/ See [www.dol.gov/esa](http://www.dol.gov/esa).

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.<sup>2/</sup>

### *B. Factual Background*

The Applicant was employed at DOE facilities from 1989 to 1995. He was a construction inspector and has claimed that he was exposed to radiation and to asbestos while working at DOE facilities. On his Request for Review, the Applicant asked for a physician panel review concerning whether his "partial removal of lung" and "hearing loss" are related to his exposures at DOE. *See* Case No. TIA-0080 Record (*Record*) at 1.

The records indicate that a pre-employment chest X-ray examination (in 1989) of the Applicant's lungs indicated that there was pleural scarring of both lungs and an abnormal soft tissue density of the apex (top) of the right lung. *Record* at 186. Subsequently, in 1992, the Applicant was hospitalized and his physician removed the apical (top) portion of the Applicant's right lung. A pathology report concerning the removed portion indicated that the tissue showed mild chronic inflammation, scarring, dilated bronchi (air spaces) with anthracotic pigment. *Record* at 45.

The Applicant was also given a pre-employment audiogram to test his hearing. This audiogram indicated that the Applicant's hearing was impaired with significant loss of hearing with regard to sounds at frequencies of 2000 Hz and above. *See* OWA Physician Panel Report (March 10, 2004) (*Report*) at 2; *Record* at 193. Subsequent audiograms also reflected a hearing loss.

The physician panel reviewed the application and issued a report. *See Report*. With regard to the portion of his lung that was removed, the panel noted that the Individual had claimed to have been exposed to radiation in 1991. However, the panel noted that the available records from the Applicant's employer indicated that he had no measurable exposure to radiation while an employee at DOE facilities. *Report* at 1. The panel found that the anthracotic pigment found in the removed portion of Applicant's lung was not a "radiation associated lesion" but represented carbon pigment from coal dust or urban pollution. *Report* at 2. The panel noted that this pigment is seen in virtually in all urban dwellers and smokers. Because the

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<sup>2/</sup> *See* [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

Applicant was a life long smoker and the abnormal apial lesion of his lung was noted on his pre-employment physical, the panel concluded that the condition of the removed lung portion noted on the pathology report was caused by smoking and not the Individual's alleged exposure to toxins at DOE.

The OWA accepted the physician panel's determination, and the OWA advised the Applicant that he had received a negative determination. *See* March 10, 2004 Letter from the Applicant to OHA. On April 8, 2004, the Applicant filed this appeal concerning the determination. The Applicant has enumerated several grounds for his appeal. First, he asserts that the panel did not address two medical conditions he believes were caused by various exposures - a lung nodule separate from the portion of lung that was removed and a blood disease causing his red blood cells to be enlarged.<sup>3/</sup> Second, the Applicant asserts that, in considering his claimed illnesses, the panel did not fully consider the possibility that he had been in fact exposed to radiation.<sup>4/</sup> With regard to his hearing loss claim, the Applicant challenges the finding that he had a pre-existing hearing loss prior to his employment at a DOE facility. He states that at the time of his pre-employment physical he was never told of this hearing problem. *See* Memorandum of telephone conversation between Applicant and Richard Cronin, Assistant Director, OHA (May 6, 2004) at 2. He also asserts that while working at various DOE facilities he was exposed to large amounts of loud noises and was not given appropriate ear protection. The Applicant also points out that at least one expert opined

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<sup>3/</sup> While the Applicant was not sure of the exact name of the condition, he may be referring to the abnormal Mean Corpuscular Volume (MCV) blood test results noted in the record.

<sup>4/</sup> The Applicant challenges the accuracy of various records relating to his occupational exposure to radiation. The records submitted to the panel indicated that the Applicant did not have any documented exposure to radiation while working at DOE facilities. *Record* at 204. However, the Applicant has given a detailed account as to his presence in a building in the DOE's Nevada Test Site in October 1991 which had an exposed amount of radioactive Cesium-137. *Record* at 200-03. The Applicant's account contradicts the DOE facility's report of the incident. Specifically, the Applicant asserts that the facility's report of the incident incorrectly states that the Applicant told the author of the report that he did not go to the level of the building having the exposed Cesium-137. In his account, the Applicant states that he went to the same level as the exposed source and stood only 6 to 8 feet from the exposed source. *Record* at 200. The Applicant believes that it would be impossible for him to stand that close to the open Cesium-137 source and not receive a measurable radiation exposure, especially since the report listed radiation exposure rates from the Cesium-137 as high as 900mR/hr. *See Record* at 208. The Applicant also notes that the report, while reporting a dosimeter badge number for another individual who was exposed, contains no listing of his dosimeter badge number.

that his hearing loss was due to occupational noise exposure. *See* Applicant Appeal Submission (April 8, 2004) at 20 (September 3, 2002 letter).

Generally, the Applicant believes that the panel did not review the available record properly and that the records themselves are not sufficiently accurate. In particular, he notes the records indicate that there were no medical records concerning a physical examination in 1994. However, the Applicant has submitted pages from his date book that he claims indicate that he had a physical examination on April 5, 1994.

## **II. Analysis**

### *A. Whether the Panel Should Have Considered the Applicant's Lung Nodule and Blood Disorder*

The Physician Panel Rule requires that the panel make a determination on each claimed illness. *See* 10 C.F.R. § 852.12. The Applicant did not claim a lung nodule or blood disorder on his application. A review of the Applicant's Request for Review by Medical Panel form indicates that in the section marked "7. What illnesses do you have that you believed is caused by your work at a DOE facility(s)?" the Applicant only wrote "Hearing Loss" and "Partial Removal of Lung." *Record* at 1. The panel considered those two claimed illnesses and therefore, complied with the Rule. If the Applicant seeks physician panel review of the two additional illnesses, the Applicant should contact the Office of Worker Advocacy.

### *B. Partial Removal of Lung*

The Physician Panel Rule requires that the panel explain the basis of its determination. 10 C.F.R. § 852.12. As described below, the panel explained the basis of its determination concerning the partial removal of one of the Applicant's lungs, and the record supports that determination.

The panel's decision is based upon records that indicate that the Applicant was a long-term smoker and that the pathology of the removed apical portion of the lung was consistent with changes caused by smoking. *See Record* at 45 (pathology report of removed lung tissue); *Record* at 30 (1992 History reporting that the Applicant had smoked ½ to 1 pack of cigarettes a day for 40 years). The Applicant's fundamental argument is with the finding that the changes in the removed lung tissue were "not a radiation associated lesion."

As an initial matter, we note that the panel finding that the removed lung tissue was "not a radiation associated lesion" is ambiguous. It is uncertain whether the panel found that the changes in the removed lung tissue are not of a type caused by radiation or whether the changes were not caused by radiation because

the Applicant had not been exposed to radiation. Nevertheless, we do not need to resolve this since there is sufficient evidence in the record to support the panel's decision no matter which interpretation is used.

Our review of the record indicates that the panel did consider the Applicant's account of his radiation exposure as well as the documentary evidence indicating that the Applicant had no measurable radiation exposure. 5/ *See Report* at 1. Given the fact that the panel considered his account as well as the other available documentary evidence, we can find no error in the panel concluding that the changes in the removed portion of his lung were not attributable to radiation. 6/ If the panel found that the changes in the removed portion of the lung were not of a type caused by radiation, then the Applicant's actual exposure to radiation is not relevant. On the other hand, if the panel found that the Individual had not been, in fact, been exposed to radiation, there is sufficient evidence in the record to support that panel finding, given the official DOE records that indicate that the Applicant had an exposure level of "0" during the year of the alleged exposure, 1991. *Record* at 204. Consequently, we find no basis to disturb the panel's determination with regard to the lung portion that was removed from the Applicant. *See Worker Appeal TIA-0045* (May 5, 2004), [www.ohadoe.gov/cases/wa/tia0045.pdf](http://www.ohadoe.gov/cases/wa/tia0045.pdf) (assertion of exposure to radiation despite the absence of exposure data is not a basis for concluding that panel determination is incorrect).

### *C. Hearing Loss*

The Physician Panel Rule requires that the panel consider whether a claimed illness was related to exposure to toxic substances during employment at DOE. 10 C.F.R. § 852.1(a)(3). As explained below, the record indicates that the Applicant's hearing loss pre-dated his DOE employment and, in any event, was not caused by exposure to a toxic substance.

The Individual's challenges to the panel's finding concerning his hearing loss center around his assertions that he was never told of his hearing loss during his pre-employment physical; that he was exposed to loud noises during his employment at DOE facilities, and that the records may be incomplete as demonstrated by the lack of a record of his physical examination in 1994. None of these arguments is sufficient for us to conclude that the panel's decision should be remanded. 7/

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5/ The Applicant notes that the panel incorrectly asserted that he had "infer[red] that his dosimetry badge was lost."

6/ In making this finding we do not express any opinion as the correctness of the conflicting accounts concerning the extent of the Applicant's Cesium-137 exposure.

7/ With regard to the Applicant's claim that one expert opined that his hearing loss was due to occupational exposure, we note that another expert that reviewed the Applicant's audiograms came to the opposite conclusion. *See Applicant Appeal Submission* (April 8, 2004) at 26 (January 17, 2003 letter). In any event, as discussed below, there is sufficient evidence in the record to support the panel's finding that the Applicant's hearing loss existed before his employment at DOE facilities.

The record clearly shows an audiogram from his pre-employment physical showing loss of hearing with regard to sounds at frequencies of 2000 Hz and above. *See Report* at 2; *Record* at 191-93. As such, it would not have been caused by his employment at DOE facilities. Thus, the panel's determination is adequately supported by evidence in the record. The Applicant's contention that the hearing loss did not exist prior to his employment at DOE facilities (because he was not informed of this hearing loss during his pre-employment physical) is outweighed by the audiogram data contained in the record.

Even if we assume that the Applicant's hearing loss had been caused by exposure to loud noises at DOE facilities, the provisions of the Physician Panel Rule would not cover the Applicant. Section 852.1(a)(3) of the Rule states:

Physician Panels determine whether the illness or death of a DOE contractor employee arose out of and in the course of employment by a DOE contractor through exposure to a toxic substance at a DOE facility.

10 C.F.R. § 852.1(a)(3). A "toxic substance" is defined in the regulations as follows:

Toxic substance means any material that has the potential to cause illness or death because of its radioactive, chemical or biological nature.

10 C.F.R. § 852.2 For purposes of this regulation, noise (consisting of various sounds) is not a "material" and does not appear to cause harm by its radioactive, chemical or biological nature. Consequently, noise does not fall within the definition of a toxic substance and therefore, illnesses caused by noise are outside the scope of the Rule. *See* 67 Fed. Reg. 52841 (August 14, 2002) at 52843 (preamble to Physician Panel Rule stating "DOE does not believe that noise operates to poison people because it does not operate by chemical action . . . it [noise] does not fit comfortably within the ordinary meaning of "toxic substances.")

Finally, while the Applicant alleges that some medical records may be missing, as demonstrated by his personal records indicating that he had a physical examination in 1994, the lack of such records would not by themselves invalidate the panel's findings. While records may be lost or misplaced, a physician panel can only review the records it has available. In the present case, we find there is sufficient evidence in the records available to the panel to support each of its findings.

***III. Conclusion***

As the foregoing discussion indicates, the Applicant's appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0080 is hereby denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: June 17, 2004

